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No. 92-751

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

SNOHOMISH COUNTY; THE SNOHOMISH COUNTY COUNCIL; and the SNOHOMISH COUNTY HEARING EXAMINER,

Petitioners,

v.

LUTHERAN DAY CARE, A NON-PROFIT CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the inability of a party to demonstrate that it has sustained a redressable injury irrevocably barr that party from successfully applying for a Writ of Certiorari to this Court?
2. Is willful, arbitrary and capricious governmental misconduct sufficient to establish a violation of the substantive due process provision of 42 U.S.C. §1983?
3. Where a conditional use permit application constitutes a vested property right under applicable state law, is a governmental entity liable in damages under 42 U.S.C. §1983 for a violation of that property right?

Page

TABLE OF CONTENTS

QUESTIONS PRESENTED. i

TABLE OF CONTENTS. ii

TABLE OF AUTHORITIES ii

INTRODUCTION 1

REASONS FOR DENYING THE WRIT:

I. The County's Petition For Writ of Certiorari Should Be Denied Because Petitioner Cannot Demonstrate a Redressable Injury As Required By Article III of the Constitution of the United States 2

II. Petitioners' Constitutional Claims Are Not Sufficiently Ripe For Judicial Review 9

III. Petitioners' Wilful, Arbitrary and Capricious Governmental Misconduct Clearly Violates The Substantive Due Process Protections Of 42 U.S.C. §1983. 10

IV. Respondent Has A Property Interest As An Owner And Conditional Use Permit Applicant Sufficient To Invoke The Substantive Due Process Protections Of 42 U.S.C. §1983. 18

CONCLUSION 23

TABLE OF AUTHORITIES

Cases:

Abbott Laboratories v. Gardiner, 387 U.S. 136 (1967). 9

American-Arab Anti-Discrimination Committee v. Thornburgh, 940 F.2d 445 (9th Cir. 1991). 9

Beach v. Board of Adjustment, 73 Wn.2d 343 (1968). 22

Bishop v. Houghton, 69 Wn.2d 786 (1966). 16

Bishop v. Wood, 426 U.S. 341 (1976) 20

Cases, continued: Page

Board of Regents v. Roth, 408 U.S. 565 (1971). 19, 20, 22, 23

Brady v. Town of Colchester, 863 F.2d 205 (2d Cir. 1988) 22

Califano v. Sanders, 430 U.S. 99 (1977). 9

Collins v. Harker Heights, 112 S.Ct. 1061 (1992). 13, 16

Daniels v. Williams, 474 U.S. 327 (1986) 14

Eastlake Community Council v. Roanoke Associates, 82 Wn.2d 475 (1973) 15-16, 21

Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979). 6, 7

Hull v. Hunt, 53 Wn.2d 125 (1958). 21

Lutheran-Day-Care v. Snohomish Co., 50 Wn.App. 1058 (1988). 23

Lutheran Day Care v. Snohomish County, 119 Wn.2d 91 (1992). 2, 7, 10, 16, 18, 23

Mackenzie v. City of Rockledge, 920 F.2d 1554 (11th Cir. 1991) 21

Mercer Enterprises v. Bremerton, 93 Wn.2d 624 (1980) 21

Norco Construction v. King County, 97 Wn.2d 680 (1986). 22

Owen v. City of Independence, Missouri, 445 U.S. 621 (1980). 11, 17

Pennell v. City of San Jose, 485 U.S. 1 (1988) 9

Perry v. Sindermann, 408 U.S. 593 (1971). 19, 20

R/L Assoc., Inc. v. Seattle, 113 Wn.2d 402, 412, 780 P.2d 838 (1989) 21, 22

Shelley v. Kraemer, 334 U.S. 1 (1948). 18

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1975) 2, 4, 5

Valley Forge College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1981). 5

Cases, continued: Page

Warth v. Seldin, 422 U.S. 490 (1974) 2, 3

Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54 (2d Cir. 1985) 22

Constitution, Statutes, and Ordinances:

42 U.S.C. §1981 (1988). 2, 3

42 U.S.C. §1982 (1988). 2, 3

42 U.S.C. §1983 (1988). . . . . *passim*

Wash. Rev. Code 64.40 *et seq.* . . . . . *passim*

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INTRODUCTION

Petitioner lacks the necessary standing to litigate constitutional issues concerning Respondent before the Court because it cannot demonstrate that it has sustained a redressable injury. The Supreme Court of Washington found Petitioner concurrently liable to the Respondent pursuant to RCW 64.40, *et seq.*, a decision Petitioner cannot appeal further. Alternatively, Petitioner's claims are

not sufficiently ripe to be justiciable in under the facts and circumstances surrounding Petitioner's conduct concerning Respondent.

In addition, the Supreme Court of Washington in *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91 (1992), correctly determined that Petitioner's deliberate, wilful, arbitrary and capricious conduct with respect to Respondent was sufficient to establish its liability for violations of substantive due process under 42 U.S.C. § 1983. Finally, the Supreme Court of Washington specifically and correctly found that Respondent had a protectable property interest of constitutional dimension in its right to a conditional use permit from Petitioner.

REASONS FOR DENYING THE WRIT

I.

THE COUNTY'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER CANNOT DEMONSTRATE A REDRESSABLE INJURY AS REQUIRED BY ARTICLE III OF THE CONSTITUTION OF THE UNITED STATES

As an element of standing necessary to litigate matters before the Supreme Court of the United States, the Court has consistently required the demonstration of a redressable injury from the party seeking judicial relief. *See generally, Warth v. Seldin*, 422 U.S. 490 (1974), *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1975). In *Warth v. Seldin, supra*, the petitioners, residents and organizations in the Rochester, New York, area, brought an action against the town of Penfield, New York, and members of Penfield's zoning, planning and town boards asserting that the town zoning ordinance impermissibly excluded individuals of low and moderate

income from living in the town in violation of 42 U.S.C. § 1981, § 1982 and § 1983. The Court dismissed the complaint on the grounds that the petitioners lacked necessary standing in order to proceed.

In *Warth v. Seldin, supra*, the Court stated with respect to standing:

> We address first the principles of standing relevant to the claims asserted by the several categories of petitioners in this case. In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal court-jurisdiction and prudential limitations on its exercise. *E.g., Barrows v. Jackson*, 346 U.S. 249, 255-256 (1953). In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society. *See, Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 221-227 (1974); *United States v. Richardson*, 418 U.S. 166, 188-197 (1974) (POWELL, J. concurring).
>
> In its constitutional dimension, standing imports judiciability: whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Article III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of judiciability, the standing question is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. *Baker v. Carr*, 369 U.S. 186, 204 (1962). The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may

> benefit others collaterally. A federal court-jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action . . . ." *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973). *See, Data Processing Service v. Camp*, 397 U.S. 150, 151-154 (1970).

Id., at pp. 498, 499 *[footnotes omitted]*.

Similarly, in *Simon v. Eastern Kentucky Welfare Rights Organization, supra*, the Court dismissed claims of petitioners alleging violations of certain provisions of the Internal Revenue Code of 1954 as amended and the Administrative Procedure Act as a result of issuance by the Internal Revenue Service of a revenue ruling allowing favorable tax treatment to a non-profit hospital that offered emergency room services but not other hospital services to indigents. The claims of petitioners were dismissed on the basis that they lacked standing to assert their claims. The Court commented upon the absolute necessity of the redressability requirement as follows:

> No principle is more fundamental to the judiciary's proper role in our system of government and the constitutional limitation of federal court-jurisdiction to actual cases or controversies. *See, Flast v. Cohen*, 392 U.S. 83, 95 (1968). The concept of standing is part of this limitation. Unlike other associated doctrines, for example, that which restrains federal courts from deciding political questions, standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Id.*, at 99. As we reiterated last Term, the standing question in its Art. III aspect "is whether the plaintiff has 'alleged such a personal stake in the outcome in the controversy' as to warrant *his* invocation of federal court-jurisdic-

> tion and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-499 (1975), *(emphasis in original). In sum, when a plaintiff's standing is brought into issue, the relevant inquiry is whether, assuming judiciability of the claim, the plaintiff is shown an injury to himself that is likely to be redressed by a favorable decision.* Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with Art. III limitation.
>
> . . .
>
> The necessity that the plaintiff who seeks to invoke judicial powers stand to profit in some personal interest remains an Art. III requirement. The federal court cannot ignore this requirement without overstepping its assigned role in our system of adjudicating only actual cases in controversy.

Id., at pp. 37-39 *[emphasis added] [footnotes omitted]*.

In *Simon v. Eastern Kentucky Welfare Rights Organization, supra*, the Court determined that the assertion as to whether the desired exercise of the Court's powers would result in the availability of additional medical or hospital services to the petitioners was speculative at best. The Court further determined that it was equally speculative whether any alleged denials of hospital services to indigents were proximately caused by the tax benefits afforded to the respondent hospitals. The case was thereupon remanded with instructions to the District Court to dismiss the complaint.

Similarly, in *Valley Forge College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1981), the Court found that an association of taxpayers lacked standing to challenge a Department of Health, Education and Welfare transfer of certain real property

to the respondent college, an institution whose primary purpose was to provide instruction of religion. The Court determined that the respondent association of taxpayers was unable to demonstrate any personal injury sustained by them as a result of an alleged violation of the Establishment Clause of the First Amendment. In so holding, the Court stated:

> But neither the counsels of prudence nor the policy is implicit in the "case or controversy" requirement that should be mistaken for the rigorous Article III requirements themselves. Satisfaction of the former cannot substitute for a demonstration of "distinct impalpable injury" . . . that is likely to be redressed if the requested relief is granted. *Gladstone Realtors v. Village of Bellwood*, 441 U.S., at 100 (*quoting Warth v. Seldin, supra*, at 501). That requirement states a limitation on judicial power, not merely a factor to be balanced in the swing of so-called "prudential" considerations.

Id., at p. 475.

The Court rejected the claim of the respondent taxpayer associations that the Establishment Clause created in each citizen a personal constitutional right such that any citizen could contest federal administrative as well as congressional expenditures under the Establishment Clause. The Court's repudiation of that contention was eloquent:

> Implicit in the foregoing is the philosophy that the business of the federal courts is correcting constitutional errors, and that "cases and controversies" are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor. This philosophy has no place in our constitutional scheme.

Id., at p. 489.

See also, Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979).

Petitioner cannot reasonably demonstrate that it has suffered a redressable injury under the circumstances here. The Supreme Court of Washington imposed liability for damages against Petitioner in favor of Respondent upon alternative grounds. In addition to having imposed liability against Petitioner for violations of 42 U.S.C. § 1983, the Supreme Court of Washington in *Lutheran Day Care v. Snohomish County, supra*, imposed concurrent and alternative liability against Petitioner for the latter's violation of RCW 64.40, *et seq.*, a State of Washington statute that imposes monetary liability against governmental entities for arbitrary and capricious or otherwise unlawful processing of permit applications. In rejecting the Petitioner County's challenge to a trial court level finding that its conduct was arbitrary, capricious or unlawful in violation of RCW 64.40, *et seq.*, the Supreme Court of Washington stated:

> Since the issues are identical in application of the doctrine and will not work an injustice on the County, we hold collateral estoppel prevents relitigation of Judge Kershner's finding that the County acted arbitrarily and capriciously in denying the conditional use permit. The effect of this holding is that, for purposes of this action, such arbitrary and capricious conduct is conclusively established. Since this is all that is required to establish a cause of action under RCW 64.40.020(1), appellant has demonstrated that it does have a cause of action against the County under that statute. Appellant's motion for partial summary judgment, establishing the County's liability under RCW 64.40.010(1) should therefore be granted. Accordingly, we reverse the trial court's denial of appellant's summary judgment

> motion and remand to the trial court with instructions to grant the motion.

Id., at pp. 116 and 117.

RCW 64.40.020(2) also entitled the prevailing parties to an award of reasonable costs and attorney's fees in addition to money damages. The Supreme Court of Washington quite clearly deemed Respondent, Lutheran Day Care, the prevailing party under 42 U.S.C. § 1983 *and* RCW 64.40.020 and awarded Respondent attorney's fees under both statutes. *Id.*, at p. 128. In so holding, the Court stated:

> *Appellant has conclusively established causes of action under RCW 64.40.020(1) and 42 U.S.C. § 1983.*
>
> . . .
>
> We therefore reverse and remand with instructions for the trial court to enter partial summary judgment in favor of appellant on the issue of liability under RCW 64.40.020(1) *and* 42 U.S.C. § 1983.

Id., [emphasis added].

Thus, the Petitioner has been found liable to Respondent for both money damages and attorney's fees upon alternative statutory grounds. Petitioner can no longer appeal from the Supreme Court of Washington decision imposing liability against it in favor of Respondent under RCW 64.40. Petitioner is, therefore, entitled to collect damages and attorney's fees from Respondent in an amount to be established by Respondent at trial.

Under these circumstances, even if this Court is inclined to grant the relief requested by Petitioner, Petitioner's legal liability to Respondent remains fixed. Thus, Petitioner has failed to properly demonstrate a "case or controversy" concerning Respondent that is an absolute necessity under the Court's consistent interpretation of

Article III standing requirements. Its Petition for Writ of Certiorari should, therefore, be denied upon this ground alone.

II.
PETITIONERS' CONSTITUTIONAL CLAIMS ARE NOT SUFFICIENTLY RIPE FOR JUDICIAL REVIEW

In addition to lacking the necessary standing to properly bring its constitutional claims before this Court, Petitioners' claims are also insufficiently ripe for judicial review. *See, Pennell v. City of San Jose*, 485 U.S. 1 (1988); *American-Arab Anti-Discrimination Committee v. Thornburgh*, 940 F.2d 445 (9th Cir. 1991). The matter of "ripeness" has been held to involve two principal considerations: (1) whether the issues are fit for judicial decision and (2) whether the parties will suffer hardship if the Court declines to consider the issues. *See, Abbott Laboratories v. Gardiner*, 387 U.S. 136 (1967) (*overruled on other grounds, Califano v. Sanders*, 430 U.S. 99 (1977); *American-Arab Anti-Discrimination Committee v. Thornburgh, supra*, at p. 453.

Here, Petitioner cannot show that it will suffer hardship in the event this Court declines to reach the merits of Petitioners' constitutional claims. First, Petitioner has already been found liable to Petitioner in damages and attorney's fees for having violated the proscriptions of a Washington statute, RCW 64.40, *et seq.*, against arbitrary and capricious governmental agency conduct in a land use context. Petitioner has not appealed from this determination of the Supreme Court of Washington. Thus, Petitioner cannot possibly demonstrate that it will suffer any hardship within the parameters of its dispute with Respondent irrespective of whether the Court addresses its constitutional claims on the merits.

Petitioner, like Macbeth, is fully aware of its unclean hands as it presents its petition to this Court. However, Petitioner is unable to demonstrate that it will sustain any redressable hardship in the future in the event this Court declines to entertain Petitioners' constitutional claims. Petitioner has no legal right under any known state or federal law, whether statutory law or derived from the common law, to engage in arbitrary or capricious conduct in the course of its administrative decision-making. As Petitioner cannot conceivably demonstrate a constitutionally protectable interest in conducting itself in an arbitrary and capricious manner in any case, present or future, Petitioner cannot properly claim hardship in the event this Court declines to revisit the question of whether arbitrary and capricious governmental misconduct is without more sufficient to trigger a violation of 42 U.S.C. § 1983. Thus, not only are Petitioners' specific claims not ripe for judicial review under the facts presented to the Court by this case, Petitioners' § 1983 claims could never be justiciable when their arbitrary and capricious misconduct has already been judicially established as a matter of fact and law.

III.

PETITIONERS' WILFUL, ARBITRARY AND CAPRICIOUS GOVERNMENTAL MISCONDUCT CLEARLY VIOLATES THE SUBSTANTIVE DUE PROCESS PROTECTIONS OF 42 U.S.C. §1983

Petitioner errs in its assertion that the substantive due process component of 42 U.S.C. § 1983 somehow requires more than arbitrary or capricious governmental entity. In *Lutheran Day Care v. Snohomish County, supra*, the Supreme Court of Washington accurately summarized this Court's holdings with respect to the

degree of required governmental misconduct under 42 U.S.C. § 1983 as follows:

> The Supreme Court has held in *Parratt v. Taylor*, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981), overruled in part on other grounds in *Daniels v. Williams*, 474 U.S. 327, 88 L.Ed.2d 662, 106 S.Ct. 662 (1986), that § 1983 imposes no state of mind requirements beyond that necessary to establish the constitutional violation involved. Therefore, if a constitutional violation is shown, relief is available under § 1983, assuming that other prerequisites stating a § 1983 claim have been met.

Id., at p. 124.

This Court has long held that in § 1983 actions that a governmental entity may not assert the defense of good faith if the facts establish wilful, arbitrary or capricious misconduct by its officials. *Owen v. City of Independence, Missouri*, 445 U.S. 621 (1980). There, this Court expressly held that a municipality could not assert a defense of good faith with respect to the conduct of its officers or agents in response to a claim of liability under § 1983. *Id.*, at p. 409. *Owen, supra*, involved an action by the city's former Chief of Police for wrongful discharge in alleged violation of his constitutionally protected procedural and substantive due process rights. This Court reversed a determination by the District Court and Court of Appeals that the respondent city was entitled to qualified immunity from § 1983 liability based upon the good faith of the city's officers or agents. In so holding, the Court reflected upon the common law history of municipality liability prior and subsequent to the enactment of § 1983:

> In sum, we can discern no "tradition so well grounded in history and reason" that would warrant

the conclusion that enacting § 1 of the Civil Rights Act, the 42d Congress sub silentio extended to municipalities a qualified immunity based on the good faith of their officers. Absent any clearer indication that Congress intended to limit the reach of a statute expressly designed to provide a "broad remedy for violations of federally protected civil rights," *Monell v. New York City Dept. of Social Services*, 436 U.S. 685, 98 S.Ct., at 2033, we are unwilling to suppose that injuries occasioned by a municipality's unconstitutional conduct were not also meant to be fully redressable through its sweep.

Our rejection of a construction of § 1983 that would accord municipalities qualified immunity for their good-faith constitutional violations is compelled by the legislative purpose in enacting the statute and by considerations of public policy. The central aim of the Civil Rights Act was to provide protection to those persons wronged by the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Monroe v. Pape*, 365 U.S. at 184, 81 S.C. at 482 (quoting *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1942). By creating an express federal remedy, Congress sought to "enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a state and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe v. Pape, supra*, 365 U.S. at 172, 81 S.Ct., at 476.

"How uniquely amiss" it would be, therefore, if the government itself—"the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct"—were

> permitted to disavow liability for the injury it has begotten. *See, Adickes v. Kress Co.*, 398 U.S. 144, 190, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) (opinion of BRENNAN, J.). A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed.

Id., at pp. 650 through 651 *[footnote omitted]*.

The foregoing principles have not been eroded by any subsequent decisions of the Court.

Contrary to the Petitioner's assertions, *Collins v. Harker Heights*, 112 S.Ct. 1061 (1992), neither expressly nor impliedly entitles governmental agencies to rely upon a good-faith defense to a § 1983 substantive due process challenge. Instead, in *Collins v. Harker Heights, supra*, the Court declined to grant the widow of a municipal worker fatally injured in the course of his employment a § 1983 substantive due process remedy merely because the respondent city may have failed to train or warn its employees about known hazards in the work place. This Court found that the city was at most negligent as a result of its failure to train its employees or to warn them about known risks of harm:

> We are not persuaded that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, *or* conscience-shocking, in a constitutional sense.

Id., at p. 1070 *[emphasis added]*.

The Court's use of the disjunctive "or" affirms that "arbitrary" conduct is sufficient to ground a substantive due

process challenge under § 1983 and that aggravated or "conscience-shocking" conduct is an alternative ground rather than a necessary prerequisite for establishing a violation of constitutional proportion. The Court in *Collins v. Harker Heights, supra*, relied heavily upon *Daniels v. Williams*, 474 U.S. 327 (1986), in which a § 1983 substantive due process claim of a prisoner injured by the negligence of a deputy employed by the respondent City of Richmond, Virginia, was rejected because of the claimant's failure to prove deliberate governmental misconduct:

> Historically, this guarantee of due process has been applied to *deliberate* decisions of governmental officials to deprive a person of life, liberty and property. . . . No decision of this Court before *Parratt* supported the view that negligent conduct by a state official, even though causing injury, constitutes a deprivation of the Due Process Clause. This history reflects the traditional and common-sense notion that the Due Process Clause, like its forbear in the Magna Carta *[sic]*, *See*, Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv. L. Rev. 366, 368 (1911), was exercised with the powers of governmental, "*Hurtado v. California*, 110 U.S. 516, 527 (1884) (quoting *Bank of Columbia v. Okely*, 4 Wheat. 235, 244 (1819))" *the touchstone of due process is protection of the individual against arbitrary action of government, Dent v. West Virginia*, 129 U.S. 114, 123 (1889) "([*Parratt, supra*, at 549])".

Id., at p. 331 *[emphasis added]*.

Here, of course, the conduct complained of against Petitioner was arbitrary or "deliberate" within the meaning of *Daniels v. Williams, supra*. The Supreme Court of Washington found as a matter of fact and law that the

County's conduct was wilful, arbitrary, capricious and unlawful:

> Judge Kershner heard the case (the second Superior Court hearing to this point) and held that there was no factual basis for the hearing examiner's conclusions, nor was "there reference to standards, if any, that support the Examiner's decision." Order on Writ of Certiorari, Clerk's Papers of Plaintiff, at 303. The Superior Court therefore remanded the matter to the hearing examiner for detailed findings of fact and identification of the standards being applied. The hearing examiner without further hearing, filed supplemental findings of fact and conclusions in support of denial.
>
> Upon review of this action, Judge Kershner held:
>
> > [b] findings and conclusions by the Hearing Examiner *constitute wilful and unreasonable action* without consideration and in disregard of the relevant facts and circumstances. The denial of the Conditional Use Permit on these grounds is arbitrary, capricious and unlawful.
>
> Clerk's Papers of Plaintiff, at 304. He therefore ordered the immediate issuance of the permit. The County did not appeal this holding and the permit was issued.

119 Wn.2d, at p. 97 *[emphasis added]*.

The arbitrary and capricious misconduct of which Petitioner has been found liable is the converse of negligence. Doctrinally, arbitrary and capricious misconduct is an *intentional* wrong. Washington's courts have consistently defined arbitrary and capricious conduct as "Being willful and unreasoning action, without consideration and in disregard of the facts or circumstances . . .". *See, Eastlake Community Council v. Roanoke Associates*, 82 Wn.2d

475 (1973); *Bishop v. Houghton*, 69 Wn.2d 786 (1966). Here, the Petitioner was expressly found liable of ". . . wilful and unreasonable action without consideration and in disregard of the relevant facts and circumstances. The denial of the conditional use permit on these grounds is arbitrary, capricious and unlawful." *Lutheran Day Care v. Snohomish County, supra*, at p. 97.

Petitioner never appealed from this final trial court determination and the Supreme Court of Washington properly held that it was collaterally estopped from belatedly raising the issue on Respondent's appeal from an adverse trial court decision of its motions for summary judgment concerning 42 U.S.C. § 1983 liability. At page 12 of its Petition for Certiorari, Petitioner correctly notes that the guarantee of due process has been applied to "deliberate" decisions of governmental officials depriving persons of life, liberty or property. Petitioner further notes that in *Collins v. Harker Heights, supra*, the complainant did not allege any "wilful" violation of its rights. In this case, however, it has been repeatedly established as a matter of fact and law that Petitioner did in fact continually wilfully, arbitrarily and capriciously denied Respondent the conditional use permit to which Respondent was at all relevant times legally entitled. Even when ordered by a Snohomish County Superior Court Judge to justify its continued denial of Respondent's conditional use permit application, Petitioner failed or refused to comply with the express order of the Court. The magnitude of Petitioner's continued defiance of judicial authority throughout the litigation has been transparently wilful irrespective of the arbitrary and capricious conduct imposed by Petitioner upon Respondent.

The sound policy reasons for denial of a good-faith defense to municipal entities in § 1983 actions was care-

fully explained by the Court in *Owen v. City of Independence, Missouri, supra*, as follows:

> Moreover, § 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations as well. . . . The knowledge of the municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policy making position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several governmental officials, each of whom may be acting in good faith.

Id., at 445 U.S. 651-652 *[citations omitted] [footnotes omitted]*.

Thus, under *Owen v. City of Independence, Missouri, supra*, and other authorities, Petitioner has no legal entitlement to engage in the wilful, arbitrary and capricious exercise of governmental power. Its conduct has been deemed wilful, unreasonable, arbitrary and capricious by every court before whom Respondent's claims have been considered. Respondent has, therefore, significantly exceeded the proof requirements of § 1983 substantive due process constitutional injury on the record before the Court.

IV.

RESPONDENT HAS A PROPERTY INTEREST AS AN OWNER AND CONDITIONAL USE PERMIT APPLICANT SUFFICIENT TO INVOKE THE SUBSTANTIVE DUE PROCESS PROTECTIONS OF 42 U.S.C. §1983

At the outset, Petitioner raises the issue of the validity of Respondent's property interest with respect to its conditional use permit application for the first time in its Petition for Writ of Certiorari. Petitioner neither briefed nor argued this issue on appeal to the Supreme Court of Washington. As a result, Petitioner is estopped from raising this issue for the first time on appeal under *Shelley v. Kraemer*, 334 U.S. 1 (1948). There, the Court declined to hear presentation of constitutional issues that had not been previously raised at lower appeallate levels. *Shelley v. Kraemer, supra*, involved this Court's invalidation of restrictive covenants governing the sale of real property which were based upon race and determined that the covenants violated Fourteenth Amendment proscriptions because state judicial action was necessary for their enforcement.

With respect to the proper criteria for establishing a substantive due process violation of 42 U.S.C. § 1983, the Supreme Court of Washington in *Lutheran Day Care v. Snohomish County, supra*, in addition to reaffirming the arbitrary and capricious standard of liability also clearly held that Respondent's conditional use permit constituted a sufficiently protectable property interest for invocation of § 1983 substantive due process protections:

> "Along with the vast majority of federal courts, we recognize that denial of a building permit, under certain circumstances, may give rise to a substantive due process claim" *(citations omitted). R/L Assoc., Inc. v. Seattle*, 113 Wn.2d 402, 412, 780 P.2d 838

(1989). We see no reason to treat denial of a conditional use permit any differently. Such denial therefore can constitute a due process violation. Such a violation is made out, however, only if the decision to deny the permit is "invidious or irrational" or "arbitrary or capricious". *R/L Assoc., Inc.*, at 412. In the present case, the trial court can be interpreted as denying appellant's due process claim based on the fact that the county did not act knowingly or recklessly in denying the permit. This is the wrong standard. The standard is arbitrary or capricious and as already discussed, Judge Kershner finding in the certiorari action that the County acted arbitrarily and capriciously in denying the permit conclusively satisfies that standard. Appellant therefore has established as a matter of law and fact that the County violated substantive due process when it denied the conditional use permit.

Id., at 125 *[footnote omitted]*.

Therefore, Petitioner's contention that Respondent lacks a sufficiently protectable property interest under the due process provisions of 42 U.S.C. § 1983 is groundless. The Court has quite clearly elucidated the proper scope of a constitutionally protected property interest for purposes of § 1983. *See, Perry v. Sindermann*, 408 U.S. 593 (1971); *Board of Regents v. Roth*, 408 U.S. 565 (1971). In both *Perry, supra*, and *Roth, supra*, the Court was presented with challenges from college professors whose employment had been terminated allegedly without procedural due process safeguards. Neither of the professors in question was "tenured" according to the formal policies of tenure followed by each institution in question. In *Board of Regents v. Roth, supra*, the Court determined that the respondent professor had no claim of entitlement to re-employment because he had only

previously managed to secure employment agreements with the Wisconsin State University—Oshkosh—for one-year terms. The facts there supported ". . . no possible claim of entitlement to re-employment." 408 U.S. at p. 578.

In *Perry v. Sindermann, supra*, however, the Court affirmed the Fifth Circuit Court of Appeals' determination with respect to the respondent's procedural due process claim that the college in question, Odessa Junior College, may have had a de facto, informal tenure policy arising from both rules and more amorphous understandings. In concluding that this de facto policy could give rise to § 1983 procedural due process protections, the Court stated:

> We have made clear in *Roth, supra*, at 571-572, that "property interests" subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." *Id.*, at 577.
>
> A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually implicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." *Id.*, at p. 601.

Cf. Bishop v. Wood, 426 U.S. 341 (1976) (discharge of police officer without a hearing did not violate any constitutionally protected procedural due process claim of the officer because under North Carolina state law, there was insufficient evidence that the officer was entitled to any guaranteed form of employment).

From *Board of Regents v. Roth, supra*, it is clear that identification of a constitutionally protectable property

interest requires examination of applicable state law for the source of that right:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. *It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.* It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id., at p. 577 *[emphasis added]*. Thus, the question of whether a party alleging a Civil Rights Act claim has a constitutionally protected property interest is, therefore, typically resolved by reference to state law. *See for example, Mackenzie v. City of Rockledge*, 920 F.2d 1554 (11th Cir. 1991) (under Florida law, no property interest is created in favor of one possessing a building permit).

Under Washington state law, the mere application of a property owner for a building permit confers vested rights, assuming the application is consistent with then applicable zoning interests. *R/L Assoc., Inc. v. Seattle*, 113 Wn.2d 402 (1989); *see also, Eastlake Community Council v. Roanoke Associates, supra; Hull v. Hunt*, 53 Wn.2d 125 (1958); *Mercer Enterprises v. Bremerton*, 93 Wn.2d 624 (1980).

The courts of Washington have consistently held that a land owner obtains a vested right to develop land when he makes a timely and complete building application. This rule has also been expressly applied to conditional use permits. *See, Norco Construction v. King County*, 97 Wn.2d 680 (1986); *Beach v. Board of Adjustment*, 73 Wn.2d 343 (1968).

Although the Court in *Board of Regents v. Roth, supra*, was considering a procedural rather than a substantive due process claim, the steps for identifying a property interest sufficient to invoke substantive due process claims are identical. *See, Brady v. Town of Colchester*, 863 F.2d 205 (2d Cir. 1988). There, the Second Circuit Court of Appeals reversed a District Court's summary judgment of dismissal of the plaintiff's substantive due process claims because of a question of material fact as to how the property in question was used at the time plaintiff's building permit was applied for. In so holding, the Court cited *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54 (2d Cir. 1985), for the proposition that in determining whether an applicant has a legitimate claim of entitlement to the issuance of a license or certificate for Fourteenth Amendment purposes depends upon whether the applicant would have very likely been entitled to issuance of the license or permit in question *but for* the alleged improper conduct of the defendant or defendants.

In the case presently before the Court, Respondent, Lutheran Day Care, clearly has a protectable property interest in issuance of the conditional use permit in question under Washington state law (*see, R/L Assoc., Inc. v. Seattle, supra*). From the record, moreover, Respondent's right to issuance of the subject conditional use permit was clearly acknowledged at the trial court level by virtue of a clear order by the Court to the Petitioner

directing Petitioner to issue the conditional use permit to Respondent. Petitioner never appealed from this final order.

The Snohomish County Superior Court has twice held that Respondent is entitled as a matter of law to issuance of the conditional use permit. Division One of the Court of Appeals in Washington has agreed (*see, Lutheran-Day-Care v. Snohomish Co.*, 50 Wn.App. 1058 (1988)) as has the Supreme Court of Washington. Thus, at least four different Washington state judges or panels of judges have unanimously and properly concluded that Respondent has at all relevant times had within the meaning of *Board of Regents v. Roth, supra*, a legitimate claim of entitlement to issuance of the conditional use permit that has been the subject matter of this litigation.

CONCLUSION

Having been found concurrently liable to Respondent in damages for its wilful, arbitrary and capricious conduct under RCW 64.40, *et seq.*, Petitioner cannot establish that it has suffered a redressable injury which is a necessary component of standing to litigate its constitutional claims before this Court. Even if the Court grants the relief requested by Petitioner, Petitioner's liability to Respondent will remain unchanged.

In addition, in *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91 (1992), the Supreme Court of Washington expressly found that Respondent, Lutheran Day Care, had a sufficiently protectable property interest in its right to a conditional use permit sufficient to ground its substantive due process claims under 42 U.S.C. § 1983. That Court also properly determined as a matter

of fact and law that Petitioner's deliberate, wilful, arbitrary and capricious conduct in its denial of Respondent's conditional use permit application constituted impermissible state action in clear violation of constitutionally mandated substantive due process requirements.

For the above reasons, Respondent respectfully requests that the Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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